Supreme Court, U. S.
FILED
MAY 9 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-1348 and 78-1388

In the Supreme Court of the United States

OCTOBER TERM, 1978

CAROLE SHEAR, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS LaMORTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The oral opinion of the court of appeals is unreported (Appendix, *infra*, 1a-4a).

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1979 (LaMorte Pet. App. 4a). The petition for a writ of certiorari in No. 78-1348 was filed on March 2, 1979. The petition for a writ of certiorari in No. 78-1388 was filed on March 12, 1979

and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioners voluntarily waived their right to remain silent after being advised of their *Miranda* rights.

2. Whether the district court abused its discretion in denying a mistrial motion based on an alleged difference in the testimony of a government witness at trial as compared to his testimony at the suppression hearing.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, each petitioner was convicted on one count of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), one count of importing cocaine, in violation of 21 U.S.C. 952(a), and one count of conspiracy to commit the foregoing offenses in violation of 21 U.S.C. 846. Petitioner LaMorte was sentenced to concurrent terms of seven years' imprisonment on each count, to be followed by a special parole term of 15 years, and a total fine of $22,500. Petitioner Shear received a suspended sentence of seven years' imprisonment on each count and was placed on five years' probation. The court of appeals affirmed (Appendix, *infra*).

At approximately 7:50 p.m. on February 2, 1978, petitioners arrived at Kennedy Airport on an international flight originating in Beirut, Lebanon. After claiming five pieces of luggage at the baggage counter, they proceeded to the United States Customs checkpoint. LaMorte told the Customs inspector that one large and one small bag were his, and that the other large suitcase and two smaller bags belonged to his traveling companion, Shear. The inspector noticed that the two large suitcases looked as if they had been purchased abroad, but were not listed on the customs declaration form. He asked LaMorte if their declaration was complete, and LaMorte responded affirmatively. The inspector then specifically inquired about the two suitcases whereupon LaMorte stated that the suitcases were old rather than new (1 S.H. Tr. 37, 40-42).[1]

At that point, the inspector began examining Shear's large blue suitcase. When he asked LaMorte if it was his, LaMorte replied that it was not and added "But you must understand these are not our cases." LaMorte explained that Air France had lost their luggage overseas and that the suitcases belonged to Air France. When Shear stated that Air France had sent them to a store in Beirut to purchase the luggage, LaMorte told her "Don't say anything." As the inspector probed inside LaMorte's black suitcase, he sensed the suitcase bottom to be "abnormally heavy * * * and also a bit thick." Accordingly, the inspector removed the contents of the suitcase, cut into the inner lining, and discovered that cardboard had been taped to the inside of the bag. After summoning his supervisor, the inspector punctured the cardboard with a knife and found a white powder secreted underneath. A field test of the powder indicated that it was cocaine (1. S.H. Tr. 43, 46-48, 73, 89-90).[2]

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[1] "S.H. Tr." refers to the transcripts of the suppression hearing held on May 30-31, 1978.

[2] In the interim LaMorte also told the customs supervisor that Air France had lost their luggage and had given them these suitcases. When the supervisor challenged this story, stating that airlines usually make cash settlements for lost luggage, LaMorte backtracked, now asserting that indeed Air France had given petitioners money and that they had then purchased the suitcases at a store (2 S.H. Tr. 40).

Following identification of the powder as cocaine, the Customs officials directed petitioners into their office, conducted a similar probe of Shear's suitcase, and again discovered cocaine secreted underneath a false bottom in that suitcase. Thereupon the inspector arrested both petitioners, separately read each petitioner his rights in accordance with *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and ascertained that both petitioners understood their rights. When both petitioners then stated that they did not wish to waive their rights (1 S.H. Tr. 49-50, 1 Tr. 44-45), the Customs officials did not ask petitioners any further questions. At no time did petitioners request counsel (1 S.H. Tr. 48-50; 1 Tr. 44-45).

Within an hour, DEA agents Joseph Giaimo and James Castillo arrived at the Customs office to take over the investigation. Although the agents were told by the Customs officials that petitioners had been arrested, the agents were apparently unaware of petitioners' initial decision to remain silent. After testing the cocaine, the DEA agents informed LaMorte and Shear individually that they were under arrest and again advised them of their *Miranda* rights. At this time, LaMorte expressly stated that he understood his rights, that he would like to answer questions, and that he did not want to consult with an attorney. When Giaimo asked about the cocaine in the suitcases, LaMorte said that he did not know how it got there and denied that he was going to deliver the suitcases to anyone. Similarly, Shear acknowledged that she understood her rights and said that she would respond to the agents' questions without a lawyer. She too denied knowledge of the cocaine that was found in her suitcase (1 S.H. Tr. 100-105, 114, 199-202; Tr. 122-124).

Shortly thereafter, the agents took petitioners to the DEA office in another part of the airport to process petitioners. At approximately 11:30 p.m., the DEA agents readvised LaMorte of his *Miranda* rights and asked him if he wished to continue talking with the agents. LaMorte responded that he still understood his rights and that he would like to answer questions. LaMorte then stated that on January 23, 1978, he had been offered $50,000 by a man named "Jerry" to smuggle the cocaine from Lebanon into New York. LaMorte said that he had been instructed to deliver the suitcases containing the cocaine to a man named Hussein Jaifar, who would be registered at the Plaza Hotel in New York City, and that Jaifar would pay him for his services. Finally, LaMorte told the agents that petitioner Shear thought she was smuggling hashish rather than cocaine. Thereafter the agents also readvised Shear of her *Miranda* rights, which she said she understood but which she did not choose to invoke. When asked if she knew about the cocaine in the suitcase, Shear, after consulting with LaMorte, answered that LaMorte had told her they would be smuggling only hashish into the country (1 S.H. Tr. 106-110, 205-209, 229-234).

Before trial petitioners moved to suppress both the statements made to the Customs officials prior to petitioners' arrest and the statements made subsequently to the DEA agents at the DEA office. Following a hearing at which petitioners did not testify, the court held that the statements made by petitioners prior to their arrest constituted routine Customs discussions and were thus not the product of custodial interrogation. The court further found that petitioners' post-arrest statements were admissible at trial because petitioners had been fully informed of their *Miranda* rights and had nonetheless voluntarily and knowingly chosen to talk (3 S.H. Tr. 3A-4A).

ARGUMENT

1. Petitioners contend (Shear Pet. 14-21; LaMorte Pet. 10-18) that they did not voluntarily, knowingly and intelligently waive their *Miranda* rights, and that their post-arrest statements to the DEA agents were therefore inadmissible at trial.[3] In particular, petitioners rely on the facts that they initially chose to remain silent, that they did not sign a written waiver of rights form, and that the agents mentioned that importation of cocaine is punishable by up to 15 years' imprisonment to show that they were coerced into making inculpatory statements. However, these essentially factual claims concerning the specific circumstances of their custodial interrogation were rejected by both courts below, and further review by this Court is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Moreover, careful analysis of petitioners' claims demonstrates that their voluntary statements were properly admitted into evidence at trial.

a. Petitioners claim that because they initially chose to remain silent at the time of their arrest by the Customs officials, they could not thereafter have voluntarily waived their *Miranda* rights. But in *Michigan* v. *Mosley*, 423 U.S. 96 (1975), this Court squarely rejected the contention that a defendant's initial decision to remain silent precludes his subsequent voluntary waiver of his *Miranda* rights. Rather, the Court concluded that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether [in the circumstances of the particular case

[3]Petitioners have apparently abandoned their challenge to the admission of their statements made to the Customs inspectors prior to their arrest.

the defendant's] 'right to cut off questioning' was 'scrupulously honored.' " *Id.* at 104. Here, as the courts below concluded, petitioners' right to remain silent was scrupulously honored.

Following their arrest, petitioners received the appropriate warnings from the Customs officials. They both stated that they understood those rights and that they did not wish to talk. This request was "scrupulously honored."[4] Approximately one hour later, DEA agents arrived at the Customs office where petitioners were being held. The agents gave petitioners a fresh set of *Miranda* warnings, ascertained that petitioners understood those rights, and asked them if they desired to answer questions.[5] Both petitioners stated that they understood their rights, that they did not want a lawyer, and that they would now answer questions. Shortly thereafter, the agents took petitioners to the DEA office, whereupon petitioners were again given their rights and again voluntarily chose to make statements. In sum, "[t]his is not a case * * * where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." 423 U.S. at 105-106.

[4]Petitioners did not ask for or consult with counsel at any time (3 S.H. Tr. 4-A). This case accordingly does not implicate the special concerns addressed in Mr. Justice White's concurring opinion in *Mosley* (423 U.S. at 110 n.2) or arguably presented in *Rhode Island* v. *Innis*, cert. granted, No. 78-1076 (Feb. 26, 1979) that arise in cases in which the suspect has requested to consult with counsel before questioning. Moreover, since the Sixth Amendment right to counsel had not attached at the time of petitioners' post-arrest statements, this case is clearly distinguishable from *Brewer* v. *Williams*, 430 U.S. 387 (1977).

[5]These agents were apparently unaware of petitioners' prior refusal to answer questions (1 S.H. Tr. 200-205).

b. Petitioners also suggest that their failure to sign a written waiver of their rights constitutes strong evidence that their statements were coerced. At the outset, we note that neither the Customs officials nor the DEA agents ever asked petitioners to sign a waiver form (1 S.H. Tr. 206-207). Thus, there is no factual basis for the inference that petitioners seek to have the Court make. Moreover, as the Court recently noted in *North Carolina* v. *Butler*, No. 78-354 (Apr. 24, 1979), slip op. 4, 6 n.5, an express written waiver of the right to remain silent is not an essential prerequisite to the waiver of *Miranda* rights.

c. Finally, petitioners contend that the authorities coerced them into talking by threatening them with prison and by taking advantage of the many hours of custody and petitioners' emotional states. However, these factual claims were correctly rejected by the courts below. Petitioners first agreed to answer questions within an hour of their arrest, and all of their statements were made within three hours of their arrival at the airport. Furthermore, the district court specifically found that there was "[n]o evidence of coercion or trickery" and that petitioners "knew and understood the warnings," were "in control of their mental and physical faculties," and were not "distraught or unable to know what they were doing" (3 S.H. Tr. 3A-4A).[6]

[6]The DEA agent's accurate statement to petitioner LaMorte that he could get up to 15 years' imprisonment if he was convicted was not coercive, since the agent did not tell LaMorte that he automatically would get such a sentence if he did not cooperate and talk (1 S.H. Tr. 113-114, 134-135). See *United States* v. *Armedo-Sarmiento*, 545 F. 2d 785, 792 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977).

2. There is also no merit to petitioner LaMorte's contention (Pet. 19-21) that the trial judge should have declared a mistrial in light of the alleged change in testimony of the Customs inspector. At the suppression hearing, the inspector testified that after arresting petitioners he read them the *Miranda* warnings and ascertained that they understood their rights. The inspector further testified that petitioners made no statements whatsoever at that time (1 S.H. Tr. 69-74). Although the inspector did not expressly state that petitioners had declined to waive their rights at that time, that conclusion was certainly suggested by the inspector's testimony concerning petitioners' complete silence following their receipt of the *Miranda* warnings. Had petitioners' counsel wished to emphasize this point further, they could have either questioned the inspector about petitioners' silence during the course of their extensive cross-examination or placed petitioners on the stand. They did neither.[7]

At trial, the inspector made explicit what was implicit in his prior testimony, namely that petitioners had chosen to remain silent immediately after they were given the *Miranda* warnings for the first time (1 Tr. 45). Because this testimony was consistent with the inspector's testimony at the suppression hearing, petitioners' assertion that the inspector "materially altered" his testimony is erroneous. Moreover, as we have noted in point 1*a* above, the government never asserted that petitioners waived their rights at this juncture, nor did it attempt to introduce any

[7]Petitioner LaMorte claims (Pet. 20) that these tactics would have been unavailing because "six government agents back up [sic] [the inspector's] substantial misstatement." But the inspector, who was the government's first witness, was the only witness to recall this episode with clarity. The other government witnesses either were not present at that time or were unable to remember what occurred (2 S.H. Tr. 45-46).

statements made at that time.[8] Rather, the government demonstrated that an hour later, when the DEA agents gave petitioners a second set of warnings, petitioners knowingly and voluntarily waived their rights. In these circumstances, the district court correctly denied petitioners' motion for a mistrial.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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Assistant Attorney General

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MAY 1979

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[8]Indeed, no questions were asked by the Customs officials at that point.

APPENDIX

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Dkt. No. 78-1350

-against-

THOMAS LAMORTE and CAROLE SHEAR,
Defendants-Appellants.

Before:

HON. STERRY R. WATERMAN, WALTER R. MANFIELD and WILLIAM H. TIMBERS, *Circuit Judges.*

New York, N.Y.
February 8, 1979

STATEMENT MADE BY THE COURT AT DISPOSITION OF APPEAL IN OPEN COURT

JUDGE MANSFIELD:

I believe you are aware that our custom, where we believe that nothing of precedential value would be served by rendering a written opinion, is to dispose of the case from the bench and that is what we are going

to do in this case. We have read your briefs very carefully. We've reviewed the pertinent portions of the record and we are going to affirm. That's no reflection upon the competency of either of you two gentlemen. You've presented your cases very well, argued them well, and I think you have put your points in the best light in which they could be put. But we do not think they are sufficiently persuasive to require reversal here.

Very briefly, I'll state our reasons for the record as best I can. This is an appeal by the two appellants from convictions of three counts charging unlawful possession and importation of cocaine in violation of Title 21 U.S.C. §841 after a jury trial before Judge Bramwell. The principal contention upon this appeal is that statements made by the appellants following their arrest at the airport, Kennedy Airport, upon arrival from Lebanon via London, were improperly admitted into evidence at trial because they were obtained by the authorities without valid waiver of their rights to remain silent and to counsel and that a new trial should have been granted in light of evidence discovered after trial.

I will not review the facts in detail except to say that on the evening of February 2, 1978, these two appellants arrived at the airport. A customs agent named Resnick, after searching their baggage found secreted in a false bottom of one of the bags white powder that was identified as cocaine and, after identifying himself and advising the appellants of their rights, he asked them whether they wished to waive their rights and they said, "No, they did not." He then suspended any further questioning. After about an hour or so an agent of the Drug Enforcement Administration arrived on the scene and he took over the matter and assumed jurisdiction. He advised the

appellants of their rights, doing so independently, first with LaMorte. Each of them said that they were willing to answer questions and I think Shear also said that she did not want a lawyer and answered the questions. Each denied any knowledge of the cocaine being in the baggage.

There followed further testimony by Agent Giaimo regarding the events of that evening. This evidence of their statements was the subject of a motion to suppress at which the agents testified but the appellants, who had the right to do so without their testimony being admitted at trial, chose not to do so. The judge concluded that he would deny their motion to suppress and from that denial the defendants appealed. Applying the principles set forth by the Supreme Court in *Michigan* v. *Mosley*, 423 U.S. 96, and in our court in *United States* v. *Cullums*, 462 F. 2d 792, to the effect that an initial refusal to waive on the part of a defendant does not preclude further efforts, after a reasonable period of time and after further warning of constitutional rights, to see whether the suspect will talk, we find that in this case that there was no violation of the constitutional rights of the defendants to remain silent and to refuse to do anything without counsel. Accordingly we believe that it is necessary here to confirm that the statements were voluntarily made and that they were not obtained in violation of the defendants' rights.

As for the newly discovered evidence point, we find that the evidence was not sufficient to entitle appellants to a new trial under the standards that we have established in this district. I refer specifically, for instance, to our decision in the *Stofsky* case. *United States* v. *Stofsky*, 527 F. 2d 237 (1975).

As for the point raised that there was insufficient evidence that the appellant Shear knew the baggage contained cocaine and believed it contained hashish rather than cocaine, we've already ruled on several occasions, the last of which was the *United States* v. *Morales*, 577 F. 2d 769 (2d Cir. 1978), with which Judge Waterman is quite familiar, that the defendant need not know the exact nature of the regulated drug to violate §841.

Accordingly, we affirm the judgments of conviction with respect to those appellants.

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